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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COLIE FOXWORTH,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Eighth District
Court of Appeals
For Cuyahoga County, Ohio

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Suite 350, Courthouse
Square Building
310 Lakeside Ave.,N.W.
Cleveland, Ohio 44113
(216) 523-1100
FAX (216) 861-4161

STEPHANIE TUBBS-JONES
Cuyahoga County Prosecutor
Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

QUESTIONS PRESENTED FOR REVIEW

I

Whether a police officer can make a valid investigative stop when he lacks specific articulable facts which support its required conclusion that criminal activity is afoot.

II

Whether a hearsay and confrontation objection to testimony can be hurdled by a reviewing Court's after-the-fact determination that the testifying witness was only stating what he understood from a conversation assertedly had with some non-testifying (arguably a phantom) declarant.

III

Whether the admission over defense objections of evidence which clearly shows its ultimate source to be a non-testifying declarant can only be validated where the evidence does

not qualify under any exception to the Hearsay Rule and its admission otherwise violates the accused's right of confrontation.

IV

Whether evidence is sufficient to support a finding of knowing possession of a contraband substance where the sole acceptable evidence presented was proof that the accused was the driver of the vehicle in which the illegal substance was found secreted in the trunk.

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RELEVANT RULES AND STATUTES

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Colie Foxworth, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth District Court of Appeals, which judgment became final on October 23, 1991, when the Supreme Court of Ohio denied further

appellate review.

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are:

1. Fourth Amendment, United States Constitution.

2. Fifth Amendment, United States Constitution.

3. Sixth Amendment, United States Constitution.

4. Fourteenth Amendment, United States Constitution.

5. Revised Code of Ohio, §2925.13.

6. Revised Code of Ohio, §2923.24.

7. Revised Code of Ohio, §2925.03.

8. Rule 29, Ohio Rules of Criminal Procedure.

OPINIONS BELOW

The judgment entry by the Supreme Court of Ohio denying further review

is set forth at Appendix "A" in the Appendix to this Petition, at page A-1.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "B", at page A-2. The Opinion by the trial Court denying the Motion to Suppress is attached herein as Appendix "C", at p. A-27.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on October 23, 1991. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1257(3).

HISTORY OF THE CASE [1]

Colie Foxworth, the petitioner herein was indicted for and convicted

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[1] References to the transcript of proceedings will be designated by the prefix "Tr." References to the Appendix to this Petition are designated Appendix " ", p. A__.

of several drug and drug related charges, i.e., Aggravated Trafficking (R.C. of Ohio §§2925.03 [A][6] and [A][2]), Permitting Drug Abuse (R.C. of Ohio §2925.13); and Possession of Criminal Tools (R.C. of Ohio §2923.24).

The appeal on questions of law from the verdict, the sentence and the final order entered thereon was taken to the Ohio Court of Appeals which was affirmed (see **Opinion**, Appendix "B", infra, p. A-2). By this Petition Colie Foxworth contends the constitutional issues are substantial and should be reviewed.

STATEMENT OF THE CASE

(A)

Detective Carosielli (of the Cleveland, Ohio Police Department) testified that on the date of Foxworth's arrest, "one of the detectives" in his unit received a

phone call from an "anonymous" female who indicated Foxworth would be delivering a kilo of cocaine in the area of "125th and Superior" Avenue (Tr., p. 11) Also, this anonymous person was credited, by this unidentifiable officer, with having said Foxworth would be "driving a silver gray Cadillac" and reportedly she gave the license plate number.

Significant here, the nameless officer who supposedly received the call did not testify and there was nothing in the evidence to verify any such call was ever received. Equally clear is the absence of proof that this asserted information was not acquired after-the-fact as was specifically contended by the defense (Tr., p. 34 & 63-64.)

Indeed, this officer admitted no record was made prior to this arrest that contained Foxworth's name in

connection with this investigation (id., 21). He conceded the only proof the police had that there was even a caller was his own testimony. Also, apart from this significant admission, there is nothing that corroborates this officer's testimony that "someone ... just spoke out in the middle ... [of their office and stated] that ... [they had] received an anonymous call from someone that Colie Foxworth would be at a particular location delivering cocaine and gave the license plate number."

Detective Carosielli next testified he informed the infamous Sergeant Gercar[2] of the call and plans were made to be in the area at that time (id., 13). They were said to

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[2] Any doubt as to the extent this police Sargeant and his crew will go to impose their brand of law enforcement on people in Cleveland's inner city is well illuminated in **United States v. Alexander, 740 F. Supp. 437 (N.D. Ohio, 1990).**

have been in the indicated area about 25 minutes when they observed a car matching the description they supposedly had been given (but could not prove was the case) before they left the police station (id., 14).

Upon seeing the car, Carosielli testified they fully intended to stop it at that time but (because of traffic) they were unable to do so (id., 15). They did, however, follow the car for several blocks and observed it pulling into a gas station parking lot (id., 15). Foxworth then exited the car and began walking "westbound on Superior from 125th" (id., 16). He was then abruptly stopped and asked "for some identification, which was produced."

Significant here, Carosielli testified that after some hesitation Foxworth "held out the keys" and said "I'm clean ... you can check the car

if you want and handed ... [him] the keys" (id., 17). The search made of the car produced the contraband that formed the basis of these convictions.

Contrary to Foxworth's testimony that he was cuffed and placed in the police car prior to the search of the car (id., 38), this detective's evidence showed Foxworth was left on the sidewalk some 40-50 feet away in the custody of Detective White while he and Gercar searched the car. Indeed, he specifically testified that "the bottom line [here is they] ... detained ... [Foxworth in order] to search the car ..." (id., p. 30). On this point, Detective White was later to testify to facts verifying that Foxworth was not free to leave his presence while the search was being conducted (id., 237).

(B)

Foxworth testified that he came

into the area to see a potential workman in connection with rehabilitation work he was doing in an apartment building his family owned. Upon leaving this person's home he had planned on stopping to see a female friend who live off Superior Avenue. He stopped to make a phone call to get precise directions (id., 36). His evidence also showed that after pulling into the station, when he realized someone was using the outdoor phone, he headed toward the laundromat on the corner to use their phone (id., 36-37).

Foxworth testified he was stopped by "an unidentified white male" who called him over to their car (id., 36-37). This male proceeded to throw him over the hood of the car and searched him by going through his pockets (id., 37). They took the keys and proceeded to search the car -- which

was parked on private property in a gas station lot.

RULING ON MOTION TO SUPPRESS

The State's basic thesis was that Foxworth consented to this search. Further, the State argued that the "anonymous tip" when coupled with (1) the given license plate number, (2) the car's description, (3) the time (4) the area and (5) the identification of Foxworth were sufficient to justify the stop (id., 67-68). Inasmuch as the identification of Foxworth occurred after his seizure, it is hard to understand how this later event (i.e., No. 4 above) is properly regarded as a relevant factor. Also, it can hardly be that the intent of the police to stop Colie Foxworth on sight can rightly be viewed as a non-factor in the required mix.

Next, the trial Court in its

discursively, rambling opinion seems to be saying (in one breath at least), that the police were making what he described as an "investigative arrest" -- whatever that is. This "arrest" was said to have been properly "based on ... the totality of the circumstances that they knew at that moment had been conveyed to them through the anonymous tipster" (id., 82). (Emphasis supplied.)

For what it is worth, given the Court's apparent recognition of the efficacy of the "totality of circumstances" test (id., 82), there is simply no way the Court should have excluded from the probable cause (or even some lesser) calculus the unrefuted inference that the "anonymous tipster," as she was characterized by the Judge (id., 82), was an after-the-fact creation of the police. Indeed, the fact that the

officer admitted he could not even identify the officer who assertedly received the call (id., 21), does not prove any such call was ever received.

Next, the trial Court articulated a very confused and indecipherable theory, which the State has, as yet, made no attempt to defend (that is, that Foxworth, although under arrest, consented to the search of his car [id., 82-85]). The Court then indicated it was reaching that decision on the basis of **United States v. Sokolow**, "cited in the Brief of the defendant" (id. 82-83).

The fact that the Court, in relying on **Sokolow** (which dealt with facts known by the agents, as distinguished from facts supposedly supplied by an anonymous source), viewed our situation and the one in **Sokolow** as synonymous, is really critical. For it simply cannot be

that the facts in the two scenarios present only a distinction without a difference. (The Opinion of our trial Court is attached herein as Appendix "C", p. A-27, to emphasize the difficulty anyone will surely have in even trying to comprehend just what was being said by the court.)

THE TRIAL EVIDENCE

At the trial the State's proof consisted of the showing (over objections) that some unidentifiable police officer had supposedly received an anonymous phone call that led directly to the arrest of Foxworth. The defense objected to this evidence as not being relevant to any issue in the case (Tr., p. 93-97). The trial Court, of course, saw it otherwise. Thus, the jury was in effect told to consider the fact some unknown policeman had supposedly received "an anonymous phone call" (id., 107-108),

which resulted in the arresting officers going to, and looking for Foxworth in the vicinity of Lakeview and Superior, in the city of Cleveland (id., 107-108). This officer was further allowed to advise the jury that the license plate number and the description of the car Foxworth was seen driving were indeed the same as had been supplied by the anonymous source to the police (id., 107 & 159-160). Also see Tr., 164 et. seq.

Next, the trial Court allowed still another Detective to testify that he called some woman, who identified herself as "Ilene", and he understood from what she told him that she wanted to purchase some drugs from Foxworth. Now admittedly Foxworth's name was not mentioned, but the inference is clear that Foxworth was the party she wanted to make the purchase from. The fact that there is

nothing except the officer's naked assertion this ever happened is only part of the problem. The other part is the Appellate Court's flawed notion that this prejudicial hearsay was admissible, not for the totally flawed and grossly inapt reasons stated by the trial Court, but for reasons that were truly even more farfetched and indefensible. See **Opinion**, Appendix "B," p. A-2.

Again, the Record shows our repeated complaints over the Court permitting the State to develop facts designed to show that when the police left the station they had all of this double hearsay (or worse) information in their possession (id., 164). Our motion, made at that time, was that this evidence should be excluded because it was not substantive proof of any of the charges (id., 164-165).

Aside from the insuperable showing that Carosielli did in fact testify that he had acted on the basis of "anonymous information" (id., 105-107), the remarks made by the prosecutor, in opposition to our request for a limited instruction, are truly classic. Here, the Record verifies the following occurred:

> **MR. WETZEL:** I vehemently object to any type of limiting instruction to the jury.

Id., 169-170. (Emphasis supplied).

It is, of course, important to understand that contrary to the Court's stated rationale, the defense did not ask Detective Carosielli "directly" or otherwise "what was in ... [his] notes" (ibid). Indeed, the Detective had earlier indicated (in response to a question put by the Court) that he did not take, or make any notes (id., 47). On the other hand, it did happen that the Court

(over our objections), seriously polluted the Record with the following segment of improper testimony:

> **THE COURT:** I've got a couple questions. Did you take any notes at all at any time prior to going out there?
>
> **THE WITNESS:** All we had was the license plate number of the --
>
> **MR. WILLIS:** Objection.
>
> **THE COURT:** Overruled. You opened it. What did you do with those notes?
>
> **THE WITNESS:** They were incorporated in the report and --
>
> **THE COURT:** And you're saying that you had -- you had notes when you went out there?
>
> **THE WITNESS:** I had on a piece of paper, the year, the make, the color and the license plate number of the car.
>
> **THE COURT:** You may inquire further.
>
> * * *
>
> Q. Let me rephrase the question. Prior to when you went out to the location, were they apprised of the

notes you had written down?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. I was sitting in the front seat.

MR. WILLIS: Objection. Not responsive.

THE COURT: Overruled.

A. I was sitting in the front seat passenger, therefore I was in control of the radio. I had my notes sitting on the front seat, as far as on my clipboard, the license plate number, the make, year, and color of the car.

Detective White was told the make, year and license plate number. Sergeant Gercar was driving and he couldn't very well be looking.

MR. WILLIS: Objection. I move the answer be stricken.

Tr., 159-161. (Emphasis supplied.)

Even more remarkable than the trial Judge's totally flawed rulings was the Court's additional responses to the above collection of incredible creations. The reference here is to

the Court's categorical statement that this officer "never testified that he had anonymous information" (id., 160). Here the Court oraculated that he knew this to be a fact because the "Court listened very carefully" to the evidence and "would indicate" that simply did not happen (id., 166). Of course, the Court's stated recollection of the evidence was not only dead wrong, it was unfortunate as well. (See Id., pp. 107, 159 & 164 et. seq.)

Equally inexcusable, if not moreso, is the prosecutor's endorsement of the Court's flawed recollections. Here our reference is to counsel agreeing with the Court that Detective Carosielli had not testified there was an anonymous source which, of course, is simply not true.

Also, on the merits, the Court

aggressively endorsed the State's development of additional, even more pungent, hearsay evidence. Here the Record shows the following egregious, indisputable hearsay, evidence was provided the jury by Detective White:

> Q. Were they [the other officers] carrying any other articles that they had retrieved from the automobile?
>
> A. A pager, the cocaine, and a box, that I recall.
>
> Q. Okay. The pager that they were carrying, did anything unusual happen while you were in possession of that pager?
>
> A. Yes, after placing the defendant under arrest, receiving information from him, the pager went off and a number appeared on the screen.
>
> Q. When that number appeared on the screen, what did you do at that time, detective?
>
> A. I called the number.
>
> * * *
>
> Q. When you called the number did anyone answer on that phone?

A. A female identified herself as Ilene.

MR. WILLIS: Objection, your Honor. Move the answer be stricken.

THE COURT: Overruled.

Q. When this female identified herself as Ilene, did she ask to speak with anyone?

MR. WILLIS: Objection, hearsay.

THE COURT: Sustained.

Q. Well, did you have a conversation with this female?

A. Yes, sir, I personally talked to her.

Q. And how long did this conversation take place?

A. A half minute.

Q. What was your understanding of the conversation --

MR. WILLIS: Objection.

Q. -- without saying what the person said?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. The person wanted to buy narcotics, sir.

* * *

Q. After you had this conversation with this person, what did you then do?

A. I told the person I would call her back in a half hour.

Q. And did there come a time that you called her back?

A. No.

MR. WILLIS: Objection.

THE COURT: Overruled.

Id., 213-215. (Emphasis supplied.)

The admission of this gross testimony along with the Court's uncalled for hostile attitude was likewise challenged and for the most obvious reasons -- both translate into due process violations.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

I

While the point has not been made clear in any of Ohio's reported cases involving citizen-police

confrontations, most cases of this type are easily resolvable on the basis of the distinction that must be made between investigative stops and arrests. Here the law is clear enough that the Fourth Amendment is invariably implicated whenever there is a detention or an investigatory stop. A valid stop requires the presence of a "reasonable suspicion" based upon "specific articulable facts which, taken together with reasonable inferences from those facts warrant an intrusion," **Terry v. Ohio, 392 U.S. 1 (1968).** An arrest, of course, requires probable cause. **Beck v. Ohio, 379 U.S. 89 (1964).**

In this case, while the Court determined the petitioner was properly subjected to an "investigative arrest" (whatever that is) the grim fact is he was victimized by a purposeful intrusion on his right to be left

alone by the police. Of course, the burden was on the police to show that the intrusion was justified. Indeed, the point was well made in **United States v. Mendenhall, 466 U.S. 544 (1980)**, that a seizure occurs if "in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." Id., at 554.

Simply put, the fact that Foxworth's keys had been taken from him and he was left with Detective White, whose evidence verifies our point, makes it clear that Foxworth had at least been "seized" in the sense of **Mendenhall**. Of course, Foxworth's own testimony shows he was actually arrested (Tr., 35-39) at the point he was stopped. Detective Caroselli's evidence shows this was their intent all along. It follows then that any argument this was not so

must overcome Carosielli's testimony that they were prevented from stopping Foxworth earlier because of the flow of traffic (id., 15).

Once it is concluded that at least a seizure occurred when Foxworth was told these men (who stopped him, took his keys and left him with the third officer) were police officers, the Fourth Amendment came into play at that point. The question then that surfaces is whether these officers had a reasonable suspicion in the context of this case. On this question, it should be noted that in **United States v. Sokolow, __U.S.__, 109 S.Ct. 1583 (1989)**, in speaking on this issue in the context of an airport stop, this Court emphasized the use of the "totality of circumstances" test (set forth in **United States v. Cortez, 449 U.S. 411 at 417 [1981])**.

Clearly, the only information

known to the police when they stopped Foxworth is aptly described as being hearsay of the double or tertiary variety. Again, the asserted facts were that a remote, anonymous source supposedly told an unidentifiable police officer, who in turn told Detective Carosielli, that (1) Foxworth would be delivering one pound of cocaine in the area of 125th and Superior, and (2) that Foxworth would be driving a silver Cadillac bearing a certain license number.

Next, these officers admitted they had no prior knowledge that our petitioner was involved in any illegal activity. Since the Court was required to consider "the whole picture" (id., **Cortez, 449 U.S., at 416-417**), it is most significant that we only have this officer's word as proof they possessed any information whatsoever (Tr., p. 21). The fact

that this officer could not even name his own source, who in turn had attributed the supposed information to an anonymous female, is surely a part of this "whole picture" concept that **Cortez** says must be reckoned with in a meaningful way.

II

The hearsay/confrontation issues in this case likewise provide a substantial reason why this cause should be reviewed. This follows because it could not be clearer Ohio's reviewing courts are obviously unwilling to clarify for our trial Courts and prosecutors when testimony must be viewed as hearsay and when its admission violates an accused's right of confrontation.

Here, of course, there is no disputing that hearsay is defined as "a statement other than one made by the declarant while testifying ...

offered ... to prove the truth of the matter asserted." **Rule 801(C), Ohio Rules of Evidence**. Here too, the critical evidence which we contend was admitted in violation of the Hearsay Rule and Foxworth's right of confrontation was Detective White's testimony that he understood some unknown person he had called wanted some drugs from the petitioner. This testimony seriously impacted against Foxworth's denial of any knowledge of the drugs found hidden in the trunk of the car he was driving.

So postured, if (as we contend) the questions asked Detective White, when viewed along with the answers given, show the State intended this testimony as an "assertion," then by definition it must be considered Hearsay and a confrontation violation.

ARGUMENT NO. I

An Officer's Stop Must Be Based On Specific, Articulable Facts And Rational Inferences.

Given the above tenet extracted from **Terry v. Ohio, 392 U.S. 1 (1968)**, it is most significant here that this Court continues to emphasize that the Fourth Amendment still requires "some minimal level of objective justification" for a **Terry** stop. See, **United States v. Sokolow, 490 U.S. 1, 7 (1989).**

Here our Court of Appeals, of course, failed to address the contention that the absence of any basis for an investigative stop was critical. Nor did it analyze our argument that when these officers abruptly stopped the petitioner their actions constituted an illegal arrest because they lacked probable cause.

This resulted in the detention and search being in violation of his Fourth Amendment rights.

The analysis made under this Argument if nothing else, shows the extent to which that Court has obviously misread **Alabama v. White**, ___**U.S.**___, **110 S.Ct. 2412 (1990)**. For clearly this Court did not hold (as our Court concluded) that the anonymous tip involved in that case alone "exhibited sufficient indicia of reliability to justify the investigative stop" (**Opinion**, Appendix "B", p. A-13-14). In **White** this Court itself regarded as "a close case" [id., 2417]), unlike the situation here there was an independent police investigation that corroborated aspects of the information supplied anonymously.

The evidence here was that the police officers' encounter with Colie

Foxworth was assertedly precipitated by an anonymous phone call from a woman. Given this claimed fact the law seems clear enough that in dealing with anonymous tips of this type, details such as the fact that the defendant would be operating a car matching the description given are not really significant. This was said to be so because "[a]nyone could have 'predicated' that fact because it was a condition presumably existing at the time of the call." **Alabama v. White, 110 S.Ct., at 2417.**

Our point here is well made when one considers that in this case the alleged tip consisted only of a bold and bald assertion that Colie Foxworth, the petitioner, would be delivering drugs in a particular area. As to this it could not be more obvious that the tip itself contained no meaningful details that could be

corroborated. It is also a matter of serious consequence that nothing happened here that tended even slightly to corroborate the informant's asserted tip. The point being, there is nothing that can possibly be said to have bolstered (even slightly) the information attributed to the anonymous source.

While the Courts below rejected our contention that an arrest occurred when Foxworth was stopped by the police, there is one point that seems clearly to have been ignored by these Ohio Courts. Here we start with the obvious fact that this Court (in White) took pains (as we see it) to add that whether the issue is "reasonable suspicion" or "probable cause," the analysis used in Gates for evaluating the role of an anonymous tip "applies", both, in the probable cause and "in the reasonable

suspicion" contexts. The only difference being the level of suspicion that must be established" (ibid). Obviously the reference then made to **Illinois v. Gates, 462 U.S. 213 (1983)**, was to the holding that a Court must consider an informant's veracity, reliability and basis of knowledge under the totality of circumstances. **Gates, 462 U.S., at 244-245.**

All this leads to the Appellate Court's bold assumption that **Alabama v. White**, literally required the validification of the stop made here. This conclusion, we submit, cannot be squared with the fact that in **White**, after recognizing that probable cause and reasonable suspicion both depend upon the quality and the quantity of the information possessed by the police, this Court fully credited the idea that:

> ... If a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable."

Id., at 2416.

Given the very relevant fact that these officers fully admitted they intended to stop Colie Foxworth on sight (a fact even the Court of Appeals concedes, **Opinion**, Appendix "B", p. A-5), the failure of the Courts below to address our contention that the police lacked any basis for a belief Foxworth was engaged in criminal activity becomes a significant fact.

So postured, the unwillingness of the Court of Appeals to deal with the impact of this circumstance, particularly on the consent issue is not without its own significance.

ARGUMENT NO. II

A Hearsay And Confrontation

Objection To Testimony Cannot Be Hurdled By Any A f t e r - T h e - F a c t Determination, By A Reviewing Court, That The Testifying Witness (Here A Police Detective) Was Only Stating What He Understood From A Conversation Assertedly Had With Some Non-Testifying (Arguably A Phantom) Declarant.

It is really an elementary rule of appellate practice that a reviewing court will not alter the theory under which evidence was offered and submitted to the jury. Having said that, it is here submitted that the Appellate Court's recitation of the facts is quite sufficient to make our point. Here the Court wrote:

(1)

... Detective White testified that while the

> officers were at the crime scene, a digital pager that had been confiscated from appellant activated, displaying a telephone number and spoke with a woman named Ilene. Several questions concerning Detective White's conversation with Ilene were asked and objected to on hearsay grounds. Detective White was eventually permitted to state that is was his understanding from the conversation with Ilene that she wished to purchase drugs.

Opinion, Appendix "B", p. A-10-11.

(Emphasis supplied.)

> **(2)**
>
> Appellant's ... claim[3] is that [sic] Detective White's testimony concerning a phone call he made to an "Ilene". At trial the Court stated

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[3] Here the Court was addressing our contention that Detective White's testimony about his asserted "phone conversation with 'Eileen'" (id., p. 9) was hearsay -- pure and simple. The fact that this ruling does not address the contention that the assailed evidence was admitted as proof of the matter asserted -- i.e., that the caller (1) existed and (2) wanted to purchase cocaine from Foxworth, is at the heart of the dispositive issue here. The actual testimony rendered by Detective White is set forth above at pp. 19-22.

> that this evidence was admissible under Evid. Rule, 901(B)(6). Evid. Rule, 901(B)(6) allows for evidence of a telephone conversation to be admitted where there is some authentication that the person answering the call is the person called. Here, the authentication of "Ilene" is not at issue, hence Evid. R. 901(B)(6) does not apply.

Opinion, Appendix "B", p. A-17-18.

Having reached this correct conclusion, the Court of Appeals then simply conjured up a completely indefensible rationale to justify the admission of this devastatingly prejudicial evidence. In this regard, the Court then wrote:

> The admission of Detective White's testimony was not error because Detective White did not recount his conversation with "Ilene," but merely stated it was his understanding [i.e., his opinion] from the conversation that she wished to "purchase drugs" [obviously from Colie Foxworth, the accused].

Id., p. A-18. Clearly the holding

that Detective White's opinionated conclusions about the conversation were admissible, and that only what was actually said by the caller was not, makes no sense at all. In other words, this holding made by the Court of Appeals (**Opinion**, Appendix "B", p. A-18) is totally devoid of plausibility. Also, it is otherwise flawed almost beyond belief.

In this case, given the total absence of any proof bearing on the knowledge aspect of the drug possession charge for which Foxworth was convicted, we cannot overlook the harm done by the admission of the hearsay evidence, which was also challenged as a confrontation violation. With reference to the argument that the Caroselli hearsay evidence (post pp. 44-47) was admissible as background, the lack of any need for background evidence in

the context of this case is really overwhelming. Additionally, the risk that the jury considered the remarks (attributed by a hearsay declarant, an unknown, non-testifying, declarant whose source was an anonymous caller) for their truth is simply overwhelming.

As bad as the above referred to debacle was, it really pales in the wake of the hearsay scenario contributed by Detective White. Here the point is made by keeping in mind the fact that Foxworth denied any and all knowledge of the presence of the contraband found hidden in the trunk of a car that was regularly used by several other people.

Thus Detective White's testimony that he called a number that appeared on a pager seized from the car and the answering person, identified as "Ilene," stated she wanted to purchase

some drugs, could not have failed to have a devastating effect on Foxworth's defense. This follows because the jury was particularly likely to have considered this statement, assertedly made by some female named "Ilene", for the truth of the matter asserted -- that is, that Colie Foxworth was in the drug selling business.

Also, to the questions put to Detective White (with reference to the call he supposedly placed to the number claimed by him to have appeared on the pager found in the car Foxworth was driving [ante, pp. 18 to 20]), the conclusion that the State fully intended this devastating testimony to be regarded as an assertion is indisputable. See **Rule 801(A), Ohio Rules of Evidence**. So postured, although the exact words supposedly used by the non-testifying declarant

(i.e., "Ilene") were not stated, the context in which these questions were asked and the answers given indicated (just as clearly as if the words themselves had been repeated) what the caller had supposedly said. Surely the Hearsay Rule cannot be circumvented in this manner -- that is, by simply by having a witness testify as to his understanding of a conversation he supposedly had with a non-testifying declarant. Yet this is precisely what the appellate Court ruled. See **Opinion**, Appendix "B", at p. A-18.

To be sure, the impact of this artificial evidence could not possibly have been anything short of devastating. This inescapable conclusion is seriously magnified by the fact that there is no purpose that can be conjured up (even now) as being a possible basis for the admission of

this testimony.

Next, it is submitted that it is most "unfair for a reviewing court to consider such evidence for any narrower purpose than for which the testimony was unquestionably offered and received at the trial." **United States v. Check, 582 F.2d 668, at 683 (2nd Cir. 1978).** On this point consider the rather sagacious remarks made by Justice Cardoza in **Shepard v. United States, 290 U.S. 96, 102-103 (1933).** There is was said, for the unanimous Court (in a case that really focuses on an aspect of the evidence spectrum involved in this case), that: where testimony was admitted for one purpose, the "trial becomes unfair if [such] testimony thus accepted may be used by an appellate court as though admitted for a different purpose unavowed and unsuspected." **Id., at 102-103.**

Thus it becomes a point of cardinal significance here, as it was in **Shepard**, that "[t]he testimony [involved] was neither offered nor received for the strained and narrow purpose now suggested as legitimate." Ibid. Also see **United States v. Hannah, 584 F.2d 27, 32 (3d Cir. 1978)** and **United States v. Check, 582 F.2d, at 681.**

Another point being made here is that even assuming arguendo, the utterances centralized in this segment of the Petition could have been properly admitted for the limited purpose indicated by the appellate court; the fact still remains there is no showing this is what happened. To be sure, what the Record only shows is that counsel's vigorously articulated objections were summarily overruled by

the trial judge.[4] This being so, there is no assurance the evidence was not considered in a way that violated Foxworth's right of confrontation.

In our view, the absence of any instruction confining and restricting the jury's consideration to whatever probative value (if any) these utterances may have had, and thus exclude them from the ambit of the Hearsay Rule, "allowed the jury to draw any inferences [it saw fit] as to the statement's allegations, explicit and implied." **United States v. Brown, 490 F.2d 758, 763 fn. 10 (D.C. Cir. 1973)**. Stated another way, the jury was free to consider this evidence without limitation, which includes using it to prove the truth of its

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[4] In this instance as well the trial Court departed from the appearance of impartiality and flagrantly took sides against the accused. See **United States v. Victoria**, 837 F.2d 50 (2d. 1988).

content.

In a nutshell, the naked conclusion by the Court of Appeals that this evidence had a non-hearsay purpose does nothing to eliminate the undeniable fact that the evidence was improperly admitted as proof of the matter asserted in spite of our petitioner's constitutional right of confrontation.

ARGUMENT NO. III

The Admission Over Defense Objections Of Evidence Which Clearly Shows Its Ultimate Source To Be A Non-testifying Declarant Can Only Be Validated If The Evidence Qualifies As An Exception To The Hearsay Rule And Its Admission Does Not Otherwise Violate The Accused's Right Of Confrontation.

Here we make it a point to emphasize that counsel's questions asked only that Detective Caroselli inform the jury whether he had personally made any notes. Carosielli's negative response only confirmed earlier testimony given by him. So postured, one must truly wonder why the trial Judge asked any questions at all. In short, the question is: what on earth was he trying to clarify for the jury? Clearly the Court's obvious motive was to prejudice the defense by emphasizing the asserted idea that the police had (at least in the Court's judgment) a very real basis for stopping Colie Foxworth.

Of course, we know, as the trial Court should have known, there was no need to establish the "validity" of the stop in front of the jury. Cf., **United States v. Carter, 901 F.2d 683,**

684-685 (8th Cir. 1990). This fact emphasizes the conclusion that the only purpose of this showing (Ante, pp. 16-18) and the other hearsay testimony provided by Detective White (discussed under the next segment of this Argument) was to rebut Colie Foxworth's ignorance defense by discrediting his testimony that he was totally unaware of the presence of the contraband found secreted in the trunk of the car.

Undeniably, the use of this evidence as substantive proof of guilt violated Foxworth's due process rights. Indeed, the fact that the trial Court attempted to justify his own uncalled for questions in this regard by stating that we "opened the door" (by asking Carosielli if he had made any notes), is so obviously a "cop out" as to be quite meaningful. For it constitutes rather conclusive

proof (as we see it), both, as to the real motivations for the questions and as to the trial Court's patent lack of impartiality. Simply put, the Court's questions clearly called for hearsay responses, which were indeed made to the jury (despite our protest). Undeniably this resulted in serious confrontation violations of petitioner's rights.

Next, with reference to the testimony of Detective White (Ante pp. 19-21) several critical facts are indisputable. One, counsel arduously tried to prohibit the jury from considering this evidence and his objections were over-ruled (ibid). The reasons given by the trial Court as to why this evidence was being substantively admitted, which reasons were inferentially adopted at the trial by counsel opposite and defended at the appellate level by him, were

totally rejected by the Appellate Courts -- and rightly so. This is so because the farfetched and outlandish reason given for admission by the trial Court was totally indefensible.

Two, that although no limiting instruction restricting this evidence to any arguably valid purpose was given (and no such purpose could possibly be shown to exist), the Appeals Court in a rather obvious effort to preserve this drug conviction, artificially created a specific basis for admission. The Court then imputed this false creation to the trial Judge as justification for his ruling.

Again this false justification for admission was not even asserted by the State at the trial level, or on appeal. On the other hand, it could not be clearer that the evidence was indeed substantively admitted, as the

State fully intended it should be, and it was so considered by the jury. Postured by these inconfutable facts the points made by Justice Cardoza, when speaking for this Court in **Shepard v. United States, 290 U.S. 96 (1933)**, should be deemed dispositive. For not unlike the situation in **Shepard**, as shown above the devastatingly prejudicial evidence here being centralized "was neither offered nor received for the strained and narrow purpose now suggested [by the appellate Court, despite being far outside even arguments made by the parties] as legitimate" (id., at 102).

Distilled what the analogy being made shows is that: although our Court of Appeals begrudgingly agreed the assailed evidence was not admissible for the patently illegitimate purpose the prosecutor fully intended it should be used by

the jury and although it was indeed considered by the jury as substantial proof, they were unwilling to correct this situation by vindicating Foxworth's right to a fair trial.

Simply put, we are thus being told there was this reserve purpose for which the evidence here being assailed was admissible. However, even this "reserved" reason, asserted by the Court, standing alone is so obscure and artificial that the required conclusion is really inescapable. To be sure, if, as was said in **Shepard**, "a trial becomes unfair if testimony ... may be used in an Appellate Court as though admitted for a different purpose, unavowed and unsuspected," **Shepard, 290 U.S., at 103**, then clearly the thrust of this tenet should be applied here full strength.

On the other hand, regardless of

the unwillingness of Ohio's reviewing Courts to even discuss either of the hearsay/confrontation issues in this case, the bottom line is the assailed evidence substantially violated, in a fundamental way, this petitioner's constitutional right to a fair trial.

ARGUMENT NO. IV

Evidence Is Insufficient To Support A Finding Of Knowing Possession Of A Contraband Substance Where The Sole Acceptable Evidence Presented Was Proof That The Accused Was The Driver Of The Vehicle In Which The Illegal Substance Was Found Secreted In The Trunk.

In this case the sole, and only, acceptable evidence that Colie Foxworth was in possession of the charged contraband was the fact that

he was the driver of the car in which the drugs were secreted. We contend this is an insufficient basis upon which to conclude that our appellant was "knowingly" in possession of the cocaine as charged in this indictment.

The difficulty with the Appellate Court's summary rejection of our insufficiency of the evidence argument lies not in the Court's flawed legal predicates, but rather in the Court's factual analysis of the Record. Simply put, for what it is worth, we will readily concede the law to be that "the credibility and weight of witnesses' testimony ... [is] within the province of the jury ... and that reasonable minds could reach different conclusions as to whether the elements of the crime charged were proven" (**Opinion**, Appendix "B", A-21-22). But this tenet simply does not address the issue as to whether (or not) the

prosecution presented evidence that was amply sufficient to support a finding that the defendant had the requisite knowledge sufficient to satisfy that element of the possession charge.

In our judgment, the law simply does not allow one to jump from the fact that an individual was operating a motor vehicle in which contraband was found, to the conclusion that he perforce had criminal knowledge of every item in the car because of this fact.

Here it seems clear enough that if we simply excise the irrelevant and improperly admitted evidence (supplied by Carosielli[5] and by Detective White[6]), it is at once apparent that the verdict here cannot pass muster. Of course, the fact that this evidence

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[5] See pp. 15-17.

[6] See pp. 18-20.

was also devastating, and prejudicial only magnifies the problem.

What seems clearly to be the case is that the Drug charge made in this indictment required as an essential element "knowledge". To reach the conclusion that Foxworth had the required knowledge, the jury obviously had to infer from his possession of the car that he also had the requisite knowledge.

Additionally, what is <u>most</u> clear here is that the admissible evidence in this case, bearing on the critical knowledge issue, tends more to sustain Colie Foxworth's denial of <u>knowledge</u> than it does the opposite conclusion. To the extent then that this is so, it cannot be said Foxworth's version, which was totally inconsistent with guilt, was not negatively influenced by the inadmissible hearsay to which reference has been made.

Since the knowledge issue could only be resolved against Colie Foxworth on the basis of substantial evidence, the absence of any proof bearing on that issue (except that provided by the accused) is most significant. This follows because to justify a conviction, the proof designed to show guilt should be sufficient to overcome the petitioner's explanation of the event.

Here the Record is totally lacking in probative evidence of guilt. Indeed, given the fact that the jury obviously rejected Foxworth's explanation, it seems clear enough (particularly in light of the State's arguments and the appellate Courts' expressed, albeit, insubstantial rationale) the jurors were of the belief it was for the defendant to prove he lacked the required knowledge.

CONCLUSION

In this case, it seems clear enough there is really no reason why the Motion to Suppress should have been denied. Since the stop of the defendant so clearly qualified as an arrest, it cannot be justified under any interpretation of the fundamental criteria in these circumstances. This criteria has been flagrantly ignored by the Courts below.

Next, it could not be more obvious that the trial Judge's rulings made in connection with our objections to the admission of certain hearsay evidence cannot be defended in law, logic or commonsense. This contention is fortified by the fact that the reasons given by the trial Court were not relied on by the Court of Appeals, which Court conjured up its own equally flawed reasons and then cited them as the basis for admission.

For all of the reasons argued herein, particularly those that will not even be addressed by counsel opposite, this cause should be reviewed.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Suite 350, Courthouse Square Building
310 Lakeside Ave., N.W.
Cleveland, Ohio 44113
(216) 523-1100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ Of Certiorari was mailed to the office of Stephanie Tubbs-Jones, Cuyahoga County Prosecutor, 1200 Ontario Street, Cleveland, Ohio 44113, on this ___ day of _____, 1991.

JAMES R. WILLIS, ESQ.
Attorney for Petitioner